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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

17 IN RE: Bard IVC Filters Products Liability  
 18 Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION IN  
LIMINE NO. 1 TO EXCLUDE  
EVIDENCE OF RECOVERY®  
FILTER CEPHALAD  
MIGRATION DEATHS**

(Assigned to the Honorable David G. Campbell)

**(Oral Argument Requested)**

20 This Document Relates to:  
 21 Debra Tinlin, et al. v. C. R. Bard, Inc., et al.  
 22 CV-16-00263-PHX-DGC

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1       Bard respectfully re-urges its motion *in limine* (Doc. 9862) to exclude any  
 2 reference, evidence, or argument at the *Tinlin* trial concerning a small number of reports  
 3 of Bard's Recovery® Filter allegedly migrating to a patient's heart resulting in death.<sup>1</sup>

4 **I. The Court's Reasoning in *Booker* Should Not Apply in this Case.**

5       “A showing of substantial similarity is required when a plaintiff attempts to  
 6 introduce evidence of other accidents as direct proof of negligence, a design defect, or  
 7 notice of the defect.” *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th  
 8 Cir. 1991).<sup>2</sup> While the Court found that Ms. Booker's complications with her G2® Filter  
 9 included virtually all of the complications associated with the Recovery® Filter, it did not  
 10 address whether instances of cephalad migration deaths were substantially similar to  
 11 complications she experienced. (Doc. 10258 at 3-4.) Had it done so, the Court likely  
 12 would have found, just as it did in *Jones and Hyde*, that “deaths by cephalad migration of  
 13 Recovery filters are not substantially similar to Plaintiff's alleged injury.” (Doc. 10920 at  
 14 5; Doc. 11041 at 2.) The Court should find the same here, because Mrs. Tinlin (like Ms.  
 15 Jones and Hyde) did not experience a migration of her entire filter “in a cephalad direction  
 16 to her heart or any other organ.” (Doc. 10920 at 5.) Rather, her filter allegedly migrated  
 17 caudally, fractured, and fractured struts embolized to her heart (like Ms. Hyde) and lungs  
 18 (like Ms. Jones). Thus, this evidence—which Plaintiffs intend to use as direct evidence  
 19 rather than just for impeachment—should be inadmissible. *See Cooper*, 945 F.2d at 1105.

20       Additionally, the Court's principle concern in *Booker*—that Plaintiffs would be  
 21 unable to present the Recovery story without this evidence, (Doc. 10323 at 4)—should be  
 22 obviated by the fact that they have done so twice now: in *Jones and Hyde*. In both cases,  
 23 Plaintiffs were not “seriously hampered in [their] ability to prove Recovery filter  
 24 complications, testing, and design when references to cephalad migration deaths [we]re  
 25 removed.” (Doc. 11041 at 12.) Indeed, they spent substantial trial time on Recovery even

27       <sup>1</sup> Counsel for Bard conferred with counsel for Plaintiffs and this motion is opposed.  
 28       <sup>2</sup> Dissimilar incidents involving the same model of product are equally barred. *Bryte ex  
 rel. Bryte v. Am. Household, Inc.*, 429 F.3d 469, 479 (4th Cir. 2005) (affirming exclusion  
 of other incidents “involving the same product” without substantial similarity showing).

1 though those cases involved G2®X or Eclipse® filters.<sup>3</sup> The death evidence is simply not  
 2 necessary to proof of a Recovery case, even if “the fact of the deaths could be viewed as  
 3 making [Bard’s] conduct . . . look more negligent.” (*Id.* at 5-6.) This is especially true  
 4 where Plaintiffs claim that other complications “caused her injuries, not cephalad  
 5 migration.” (*Id.* at 6.) Further, Plaintiffs are not precluded “from asserting that filter  
 6 migration, tilt, fracture, and perforation can cause serious health effects including death,”  
 7 as they did extensively in *Jones* and *Hyde*. (*Id.* at 5.)<sup>4</sup> This evidence should be excluded.

8 **II. Cephalad Migration Death Evidence is Inadmissible Under Rule 403.**

9 This Court was “concerned” in *Booker* “that too heavy an emphasis on deaths  
 10 caused by cephalad migration of the Recovery filter – a kind of migration which did not  
 11 occur in Ms. Booker’s case – would result in unfair prejudice that substantially outweighs  
 12 the probative value of the cephalad migration evidence.” (Doc. 10323 at 4.) This concern  
 13 is highly warranted in this Recovery Filter case, and substantially outweighs the minimal  
 14 probative value, if any, this evidence may have. *See Fed. R. Evid. 403.*

15 Because Mrs. Tinlin did not experience a fatal migration of the *entire* Recovery  
 16 Filter to her heart, the “jury could easily be confused or misled into imposing liability on  
 17 the mere basis of what *could* have happened rather than what *did* happen.” *Bauerlein v.*  
 18 *Equity Residential Properties Mgmt. Corp.*, No. CIV 04-1904 PHXSMM, 2007 WL  
 19 1546101, at \*1 (D. Ariz. May 24, 2007) (excluding evidence of other deaths involving  
 20 defendant’s products). This evidence will serve no purpose other than to inflame the jury  
 21 and impermissibly “prompt a jury decision based on emotion.” (Doc. 10819 at 6.) Indeed,  
 22 Plaintiffs spent substantial trial time on this evidence in *Booker* and heavily emphasized it

23  
 24 <sup>3</sup> A search of the transcripts shows that “Recovery” was mentioned more in *Jones* (over  
 25 800 times) and *Hyde* (over 600 times) than the actual filters at issue in those cases  
 26 (“Eclipse” mentioned little over 700 and 600 times in *Jones* and *Hyde*, respectively, and  
 27 “G2X” less than 600 times in *Hyde*). Contrast *Booker* where “Recovery” was mentioned  
 28 nearly half the time (over 800 times) than “G2” (nearly 1500 times), the filter at issue.

<sup>4</sup> Plaintiffs even repeatedly presented the migration deaths generally to the jury in *Jones* and *Hyde*, referring to them as “catastrophic” injuries or events. (*See Exs. A, B; e.g., id., Hyde Trial Tr. at 924:24-925:1 (“[A]s of the date you had that review, there was already a migration of a Recovery filter in a patient that caused a catastrophic injury. Do you recall that?”).*) Bard believes this is a fair compromise for the exclusion of this evidence. (*Id.*)

1 in closing. (See, e.g., Ex. C, *Booker* Trial Tr. at 2490:13-15 (“They just put [the Recovery]  
 2 out blindly into the world without knowing what was going to happen. And guess what  
 3 happened? 19 people died from that Recovery device.”); *id.* at 2492:11-17 (“[T]he  
 4 Recovery filter was causing more deaths than any other device on the market, including  
 5 their [SNF]. Isn’t that – I mean, that is not a stop sign. I mean, that is a giant wall to  
 6 stop. Our device is causing more fatalities than the device that allowed us to get it on the  
 7 market.”); *id.* at 2494:18-22 (“Don’t you think they should have told Dr. Cohen so he  
 8 wouldn’t have had statistic number six? Because I’m sure if they would have told  
 9 Dr. Cohen, somebody they were paying that was a consultant to them, they didn’t have the  
 10 decency to tell him, then they just allowed two of his patients to die.”).) Admission of this  
 11 evidence will unfairly prejudice Bard, waste time, likely confuse the jury, and prevent the  
 12 parties from trying the issues presented by this particular case. It should be excluded.

13 **III. Admitting Cephalad Migration Death Evidence Would Violate Due Process.**

14 Pursuant to the Due Process clause, “[a] defendant’s dissimilar acts, independent  
 15 from the acts upon which liability was premised, may not serve as the basis for punitive  
 16 damages.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Due  
 17 Process prohibits imposing punitive damages to “punish and deter conduct that b[ears] no  
 18 relation” to a plaintiff’s injury. *Id.* at 422–23. The Wisconsin Supreme Court has also  
 19 made clear that punitive damages may not be awarded based on conduct that did “not  
 20 cause or contribute to the plaintiff’s loss.” *Henrikson v. Strapon*, 758 N.W.2d 205, 211  
 21 (Wis. 2008); *see also Kehl v. Economy Fire & Cas. Co.*, 433 N.W.2d 279, 280 (Wis. Ct.  
 22 App. 1988); (Doc. 12734 (“*Kehl* and *Henrikson* make clear that actions of a defendant are  
 23 not admissible on punitive damages unless they caused or contributed to the plaintiff’s  
 24 loss.”).) Here, Mrs. Tinlin did not suffer a fatal migration of the *entire* Recovery Filter to  
 25 her heart. Therefore, this evidence bears no relation to Bard’s potential liability for her  
 26 underlying tort claims, and both Due Process and Wisconsin law prohibit its use to impose  
 27 punitive damages on Bard in this case. *See Campbell*, 538 U.S. at 423; (Doc. 12734.)

28 For these reasons, Bard respectfully requests that the Court grant its Motion.

1 RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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